IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-5952

DETA MONA TRIMBLE AND
JESSIE TRIMBLE,

Appellants,

v.

JOSEPH ROOSEVELT GORDON, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

REPLY BRIEF OF THE APPELLANTS

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ARGUMENT

I.

THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN BASED SOLELY ON THEIR ILLEGITIMACY SHOULD BE SUBJECTED TO THE SAME RIGOROUS EQUAL PROTECTION SCRUTINY THAT THIS COURT HAS APPLIED PREVIOUSLY TO CLASSIFICATIONS AGAINST ILLEGITIMATE CHILDREN.

The invidious discrimination established by Section 12 of the Illinois Probate Act,[1] barring illegitimate children from inheriting from their intestate fathers, bears no rational or fair and substantial relationship to any legitimate state interest, as will be shown in Section II, *infra*. Appellants have also argued, however, that the statute should be subjected to a level of scrutiny higher than that imposed by the "traditional" or "rational basis" equal protection test. Illegitimate children share certain attributes with other traditionally disadvantaged groups, discrimination against whom has been closely scrutinized (Appellants' Brief, pp. 14-21). In a series of cases the Court has noted this and has closely scrutinized discrimination against illegitimate children. (Appellants Brief, pp. 21-30).

In response, Appellee's Brief correctly states (pp. 9-10) that this Court had not held that a classification against illegitimate children is "suspect."[2] At this point, however, Appellee goes astray by implying that the statute may be effectively insulated from any equal protection scrutiny. This implication comes in several forms. First, Appellee emphasizes that there is no "right to inherit." (Appellee's Brief, pp. 10, 12) No argument has been made that there is a constitutional right to inherit. Nevertheless, the legislature, in creating any statutory right, must not invidiously discriminate without rational basis. The absence of a "right to inherit" does not suspend equal protection inquiry.

Second, Appellee argues that the crucial purpose of the Illinois intestate succession law is to provide a

[1] What was formerly Section 12 of the Probate Act, Ill. Rev. Stat. ch. 3, §12, effective at the time of Sherman Gordon's death, has been recodified in 1976 as Ill. Rev. Stat. ch. 3, §2-2. Public Act 79-328. No substantive change or change in wording has been made in the recodification.

[2] Appellee also submits extensive citation from such cases as *Morey v. Doud*, 354 U.S. 457 (1957), and *Dandridge v. Williams*, 397 U.S. 471 (1970) (Appellee's Brief, pp. 6-8), which merely define in the abstract the "traditional" equal protection test, a rational relationship to a legitimate state purpose.

method of disposition of property at death without a will. (Appellee's Brief, pp. 10, 14). While the statement is true so far as it goes, it conveys no real meaning; in effect it says that the purpose of the statute is to exercise a state power. That, however, is the function of any state statute; as will be seen, it does not define the type of inquiry that must be made into the rationale for invidious discrimination. Third, Appellee cites *Labine v. Vincent*, 401 U.S. 532 (1971), to the effect that the power to make discriminatory intestate succession laws is somehow uniquely and absolutely committed to the state.[3]

What these suggestions by Appellee have in common is an assumption that when a state exercises a traditional state function, in an area that does not involve basic Constitutional rights, the statutory discrimination is virtually insulated from Equal Protection review. This is simply incorrect. The traditional state function, like any state action, must be exercised in a manner free from invidious discrimination, and free from discrimination unrelated to legitimate state purposes. Moreover, as the statute tends to affect fundamental rights or to impose invidious discrimination against a traditionally disadvantaged and politically powerless group, closer scrutiny becomes appropriate. Thus, one noteworthy factor in this Court's prior holdings invalidating discrimination against illegitimate children is the consistent presence of statutory schemes in which the legislature is normally given substantial latitude: *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glona v. American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968), concerned a Louisiana statutory wrongful death scheme; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), involved state-created workmen's compensation benefits; *Gomez v. Perez*, 409 U.S. 535 (1973), considered the state's imposition of paternal obligation to

[3] This dictum in *Labine* has been particularly criticized. Section IV-B, *infra*; dissent in *Labine*, 401 U.S. at 548-549. See also *Reed v. Reed*, 404 U.S. 71 (1971).

support; *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973), concerned a state-funded General Assistance program; *Stanley v. Illinois*, 405 U.S. 645 (1972), involved state child custody laws.[4] These are traditional state functions, comparable to intestacy laws; this factor, however, did not insulate the statutes from normal Equal Protection analysis. Rather, there was a heightened scrutiny because of the nature of the group against whom the discrimination was occurring–illegitimate children. Similarly, in *Reed v. Reed*, 404 U.S. 71 (1971), the intestacy statute was carefully scrutinized because of the character of the disadvantaged group–women.

This Court's most recent decision in this area, *Mathews v. Lucas*, ____ U.S. ____, 96 S.Ct. 2755 (1976), reasserts the principles of such scrutiny of broad exclusionary classifications against illegitimate children. While *Lucas* rejects the argument that classifications based on legitimacy are inherently suspect, and therefore subject to "strict scrutiny," it also emphasizes that the standard of review applied is "not a toothless one" and describes the case as being "in this realm of less than strictest scrutiny." 96 S.Ct. at 2764. In defining a standard, the *Lucas* statements of the status of illegitimacy and the nature of the inquiry into the discrimination are drawn from and reaffirm *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164 (1972); *Gomez v. Perez*, 409 U.S. 535 (1973); and *Jimenez v. Weinberger*, 417 U.S. 628 (1974), all of which subjected classifications based on illegitimacy to rigorous scrutiny, and found them offensive to the

[4] Similarly, the Social Security illegitimacy cases, *Mathews v. Lucas* 96 S.Ct. 2755 (1976); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Beaty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), *aff'd*, 418 U.S. 901 (1974); *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd* 409 U.S. 1069 (1972), concerned a governmental function in which the legislature is traditionally given broad latitude. Compare *Weinberger v. Salfi*, 422 U.S. 749 (1975).

Equal Protection Clause. (See Appellants' Brief, pp. 20-30.)

Lucas thereby confirmed that an exacting standard of review is to be applied to broad exclusions of illegitimate children. Crucial to the actual holding was the Court's observation that (unlike most of the other illegitimacy cases previously considered, from *Levy v. Louisiana*, 391 U.S. 68 (1968), through *Jimenez, supra*[5]), *Lucas* involved a classification which broadly favored entitlement, providing benefits to any child whose paternity was adjudicated *or* who was acknowledged *or* who could prove other minimal attributes of dependency. The *Lucas* provisions thus extended benefits to almost all sub-classes of illegitimate children, excluding only a small group who could meet none of the several alternative criteria for entitlement. *Lucas* carefully distinguished the scheme of favorable presumptions, based on "reasonable empirical judgments that are consistent with a design to qualify entitlement" upon the presentation of relevant evidence, from prior cases where "not only was the legitimate child automatically entitled to benefits but an illegitimate child was denied benefits solely and finally on the basis of illegitimacy. . . ." 96 S.Ct. at 2765.

Even this relatively benign statutory scheme was carefully analyzed, and was upheld only because, in contrast with other statutes discriminating against illegitimate children,

> the statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations.

Lucas, 96 S.Ct. at 2766.

[5] The sole partial exception is *Labine v. Vincent*, 401 U.S. 532 (1971), in which some illegitimate children were precluded from intestate succession from their fathers. But these same children were granted support rights from their fathers' estates. The fact that the statute did not deny all entitlement may explain, to some extent, the Court's decision upholding the statute. See Appellants' Brief, pp. 29-30, 50-52; Section IV-A, *infra*.

Lucas, then, is consistent with this Court's prior decisions carefully reviewing statutory schemes which totally exclude illegitimate children from protection or benefits accorded other children. The Court reaffirmed the principles previously stated that ". . . the legal status of illegitimacy, however defined, is like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society," and that imposing disabilities on innocent children simply because of their birth status remains "illogical and unjust." *Lucas*, 96 S.Ct. at 2762. Certainly the standard enunciated and applied in *Lucas* is a rigorous one, and the Court's explanation of its refusal to apply strict scrutiny *per se* does not negate the propriety of rigorous review of much broader and harsher statutory classifications, such as the one present in this case. Thus the broad exclusionary classification embodied in §12 of the Illinois Probate Act must be subjected to the scrutiny articulated and utilized in the cases from *Weber* through *Lucas*. By any standard of review, however, the instant classification is irrational and unconstitutional, as will be shown in the next section.

II.

THERE IS NO RATIONAL BASIS FOR THE INVIDIOUS DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN.

Appellee essentially offers three alleged justifications for the challenged classification: that the statute is in accord with the presumed intent of decedents; that there was no insurmountable barrier to Sherman Gordon writing a will; and that the state has a legitimate interest in preventing spurious claims and in the prompt devolution of intestate property. None of these elements can justify the total exclusion of illegitimate children embodied in Section 12 of the Illinois Probate Act.

A. The discrimination against illegitimate children is not rationally related to the alleged presumed intent of decedents.

Appellee argues that Illinois has a legitimate interest in satisfying the "presumed intent" of decedents who die intestate and that the state furthers that interest by excluding all illegitimate children from intestate succession from their fathers. (Brief for Appellee, pp. 16-18.) This rationale is fallacious for several reasons.

First, the entire theory rests on labelling as private action what is really state action; but a distinction between the two lies at the very heart of the Equal Protection Clause. Intestate succession laws are *not* wills drawn by individuals; they are legislative commands, which declare state policy, and as such are subject to the dictates of the Equal Protection Clause. While a private citizen in Illinois may generally pass property in a will in any way he sees fit, the state is prohibited from itself making such discriminatory choices. *Cf. Evans v. Newton*, 382 U.S. 296 (1966); *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957); *Reed v. Reed*, 404 U.S. 71 (1971). Even if it were true that some men might want to disinherit their illegitimate children, that can hardly serve to justify such discrimination by the state itself. As stated by the

Seventh Circuit, invalidating an intestate discrimination against illegitimate children:

> In our judgment, the presumed intent of intestate decedents is an unacceptable justification for a decision by the state which the state would otherwise be unable to justify. * * * Just as private schools or private hospitals may place some arbitrary limits on the classes of people they will serve, so may testators make irrational choices in the distribution of their property. But when the choice is made by the government, the obligation to afford all persons equal protection of the laws arises. *Eskra v. Morton*, 524 F.2d 9, 14 (7th Cir. 1975).[6]

Similarly, in *Pendleton v. Pendleton*, 531 S.W.2d 507, 510 (1975), *appeal docketed*, 44 U.S.L.W. 3711 (May 4, 1976) (No. 75-1610), the Kentucky Court of Appeals, objecting to the result mandated by *Labine v. Vincent, supra*, said:

> We find no justification in logic for [the state's] authority to deny illegitimate children the same right of inheritance *conferred upon* other children. (Emphasis added.)

In short, it is the state action that is actively denying the illegitimate child inheritance rights, and is substituting a patrimony of stigma.

The suggested dichotomy between normal state action and, in intestate succession, neutral alignment of the state's intestacy disposition with presumed private intent, is in addition misleadingly facile. The entire field

[6]The full quotation from *Eskra* appears in Appellants' Brief, at pp. 47-48. See also *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950), invalidating segregated facilities in a graduate school:

> "There is a vast difference - a Constitutional difference - between restrictions imposed by the state[and individual social action]. The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant . . . ."

is replete with state activity granting or restraining testamentary capacity, and encouraging or mandating discrimination against illegitimate children. For example, a substantial portion of the population, under Illinois law, lacks testamentary capacity because they are minors or not of sound mind or body, Ill. Rev. Stat. ch. 3, §42; the wills of others fail. In these circumstances the State's intestacy disposition alone controls, as it also governs the disposition of assets not devised by an existing will, Ill. Rev. Stat. ch. 3, §51, and the forced share of children born after the will is made, Ill. Rev. Stat. ch. 3, §48.[7] In such instances, there is no testamentary ability to override the state action which discriminates against illegitimate children.

Analogously, Illinois uses a variety of methods to promote discrimination and discourage or prohibit fathers from leaving part or all of their assets to illegitimate children. For example, there is a higher inheritance tax rate on bequests to illegitimate children who are acknowledged for less than 10 years, like Deta Mona Trimble, in comparison to the preferential tax rate on transfers to spouse, parents, children,[8] and "persons to whom the decedent, for not less than ten years prior to death, stood in the acknowledged relation of a parent." Ill. Rev. Stat. ch. 120, §375.[9] Other

[7]Ill. Rev. Stat. ch. 3, §42 is recodified as ch. 3, §4-1; ch. 3, §51 is now ch. 3, §4-14; ch. 2, §48 is now ch. 3, §4-10. See note 1, *supra*.

[8]"Child" does not include illegitimate children. *Murphy v. People*, 213 Ill. 154, 72 N.E. 779 (1904); *Hardesty v. Mitchell*, 302 Ill. 369, 134 N.E. 745 (1922).

[9]The differential exemptions and rates embodied in the statute would cause the following tax burdens on testate transfers received by various relatives: on a $3,000 transfer $0 tax on spouse, legitimate children, parents, etc., and $290 tax on illegitimate child acknowledged for less than 10 years; on a $20,000 transfer, $0 tax and $1,990 tax, respectively; on a $100,000 transfer, $2,200 tax and $13,594 tax, respectively. Similar provisions exist in other states. In Pennsylvania the tax

(continued)

states use a variety of analogous devices to inhibit the testamentary capacity of the father of an illegitimate child. H. Krause, *Illegitimacy, Law and Social Policy* 41-42 (1971).

In short, as stated in *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1941); "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance." In Illinois, a pattern of such state action is being used to crystallize and perpetuate invidious discrimination. This case presents two groups of children identically situated, except that one group—the illegitimate children—have historically been subject to legal disabilities and social opprobrium due to no fault of their own. To say that a statute is justified because it sanctions the desire of some persons to perpetuate such disabilities and stigma would hide any invidiously discriminatory state action under a smokescreen of self-fulfilling prophecy.[10] But, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot constitute a *legitimate* govern-

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(footnote continued from proceeding page)

rate on testate transfers received by legitimate children and certain other relatives is 6%, but on bequests to illegitimate children is 15%. Pennsylvania Taxation and Fiscal Affairs Code, 72 P.S.§§2485- 102(a), 2485-403, 2485-404. In Illinois, additional bars to transfers at death are entwined with the discriminatory pattern. Some public employee death benefits of fathers are not available to illegitimate children. E.g., Ill. Rev. Stat. ch. 108-1/2, §§8-158, 11-153 (municipal employees, officials, and laborers, in cities over 500,000 population).

[10] As stated in *Miller v. Laird*, 349 F. Supp. 1034, 1044 (D.D.C. 1972) (three-judge court), invalidating an exclusion of illegitimate children from a medical care benefits scheme for servicemen's children:

> "This notion of a general lack of parental concern for the welfare of illegitmate children is nothing more than sheer speculation. *** Such a premise is entirely too precarious to comprise a rational supporting basis. . . ."

mental interest." *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

Second, the statute at issue here does *not* reflect the intent of the people of Illinois, 95% of whom believe that the illegitimate child should not be completely excluded in intestacy. Krause, *Illegitimacy, Law and Social Policy* 167 (1971). This opinion was generally held regardless of the sex, race, income, education, occupational level, political party identification, marital status or age of the respondents. Krause, *supra* at 162, 167.

That "presumed intent" was not and cannot be a basis for the exclusion of illegitimate children is also the apparent view of the Illinois Supreme Court. While decedent intent may be a legislative consideration underlying other provisions of the intestacy statute, there is no evidence that the State of Illinois believes it is in accord with decedents' intentions in disinheriting illegitimate children.[11] What evidence there is leads to the opposite conclusion. The decision in *In re Estate of Karas*, 61 Ill.2d 40, 329 N.E.2d 234 (1975) (A 38-52) fails to mention "presumed intent," focusing only on alleged purposes of promoting family relations (A 44-45) and preventing spurious claims (A 48-49). This failure is less surprising when it is realized that nothing in the Probate Act or its history reveals such a purpose. In fact, the only purpose for these provisions consistently found by the Illinois courts is that of mitigating the harshness of the common law doctrine that the

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[11] *Krupp v. Sackwitz*, 30 Ill. App. 2d 450, 174 N.E.2d 877 (1st Dist. 1961), cited by Appellee at pp. 17-18 of her Brief, does not intimate to the contrary. *Krupp* simply states, erroneously (see Section II-B, *infra*), that intestate succession is equivalent to intended testamentary disposition because the decedent is presumed to know the law and to have adopted its provisions.

illegitimate child was *filius nullius*, by allowing children to inherit from their mothers.[12]

In other words, rather than reflecting the presumed intent of Illinois decedents, the statute merely reflects archaic stereotypes and a medieval system of punishing innocent illegitimate children for the perceived sins of their parents. The "presumed intent" argument is founded upon the generalized notion that male decedents will not want illegitimate children to inherit. In recent years this Court has repeatedly found such overbroad, absolute exclusions to be constitutionally offensive when they are based: a) on archaic notions of the status of illegitimate children, *e.g., Jimenez v. Weinberger, supra; Weber v. Aetna Casualty & Surety Co., supra; Gomez v. Perez, supra*; b) on archaic sexual stereotypes, *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Reed v. Reed*, 404 U.S. 71 (1971); and c) on a mix of sex and illegitimacy stereotypes, assuming no relation between illegitimate child and father, *Stanley v. Illinois*, 405 U.S. 645 (1972).[13]

Here the stereotypes underlying the statute are of illegitimate children undeserving of paternal interest and

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[12] Recognizing this, the court in *Karas* quoted a long passage from its decision in *Smith v. Garber*, 286 Ill. 67, 70, 121 N.E. 173 (1918), interpreting the predecessor of §12 of the Probate Act, in which the Court found that these sections "were enacted for the purpose of obviating the undue severity of the common law and of erecting a rule more consonant with justice to an innocent and unfortunate class . . ." *Karas*, at A 41-42.

[13] Ironically, if Peter Stanley were to die today intestate, after fighting for the right to custody of his children all the way to this Court, Illinois would "presume" that his interest in the children was so minimal that he would prefer his property to escheat to the state rather than be given to the children. Moreover, inconsistently with the "presumed intent' alleged to underlie this statute, the custody rights of fathers of illegitimate children have been expanded, since *Stanley*, in Illinois and other states, so that they now are equal to those of mothers. See *Irby v. Dubois* __ Ill. App.3d __, 354 N.E. 2d 562 (1st Dist. 1976), and cases cited therein.

of irresponsible men who have no interest in the children or their welfare. Sociological research, however, indicates that fathers of illegitimate children often have long relationships with the mother, and demonstrate concern for both mother and child.[14] A significant proportion of the children actually live with their fathers rather than their mothers,[15] and a far greater percentage of children live with both parents, as did Deta Mona Trimble,[16] or have fathers who demonstrate concern. Twenty-nine states have recognized the invalidity of the outdated stereotypes and presumed a paternal intent that illegitimate children, who meet established criteria of proof, should inherit. (See Appendix to Appellants' Brief.)

In instances in which the paternity of the child has been established, the intent of the decedent cannot be based on pure legislative speculation about the subjective motives of fathers, where such speculation establishes a bar to all illegitimate children. Rather, the

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[14] See Herzog, "Some Notes About Unmarried Fathers," 45 *Child Welfare* 194 (April 1966); Wessel, "A Physician Looks at Services for Unmarried Parents," 49 *Social Casework* 11 (1968); Chaskel, "Changing Patterns of Services for Unmarried Parents," 49 *Social Casework* 3 (1968); Sauber and Rubenstein, *Experiences of the Unwed Mother as a Parent* (1965); Pannor, Massarik & Evans, *The Unmarried Father* (1971); H. Pope, "Unmarried Mothers and Their Sex Partners," *Journal of Marriage and the Family* 555 (August, 1967).

[15] U.S. Bureau of the Census, *U.S. Census of the Population 1960 - Vol. 1, Characteristics of the Population, Part 1 U.S. Summary*, U.S. Government Printing Office, Washington, D.C. 1964, Table 185; U.S. Bureau of the Census, *U.S. Census of the Population 1970 - Vol. 1, Characteristics of the Population, Part 1 U.S. Summary - Section 2*, U.S. Government Printing Office, Washington, D.C. 1973, Table 206.

[16] "[The] illegitimate child may suffer as much from the loss of a parent as a child born within wedlock .... So far as this record shows the dependence and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children ...." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 169 (1972).

intent of the father in regard to his surviving illegitimate child must be measured by correlative objective evidence of the father's relationship, *e.g.*, a paternity adjudication or acknowledgement. Decisions from *Weber v. Aetna Casualty & Surety Co., supra*, through *Mathews v. Lucas, supra*, have established that the status of birth alone cannot stand as an accurate index of whatever the state is trying to measure, including the intimacy of the relationship. Thus, using objective criteria, the overexclusion of illegitimate children based on unsupported legislative assumption of invidious private intent, and the overexclusion based on illusory or overgeneralized proof problems (see Section II-C, *infra*) are equivalent; these overexclusions, both of which ignore the objective evidence of paternal relationship, are then equally invalid. See *Mathews v. Lucas*, 96 S.Ct. at 2765, upholding a narrow exclusion of illegitimate children only because it was based on "reasonable empirical judgments that are consistent with a design to qualify entitlement" of the child when there is objective evidence of the father-child relationship before death.[17]

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[17] Similarly, *Mathews v. Lucas* noted, 96 S.Ct. at 2766-2767, that intestacy law as a residual criterion of proff may coincide with perceived parental obligation to the illegitimate child in other circumstances, concluding that where intestacy law does not protect the child, there is a nexus to a presumption of lack of likelihood of actual support (in the absence of actual evidence showing support). The converse is equally true: where there is objective evidence of support or of other adjudicated or assumed parental obligation, it is necessary to presume an intended fulfillment of parental relationship and obligation in the intestacy statute. Illinois ignores the logic of this nexus.

B. The discrimination against illegitimate children is not rationally related to any State interest which is based on the fact that there was no insurmountable barrier to Sherman Gordon writing a will.

The Appellee further argues (Appellee's Brief, p. 26) that the decedent Sherman Gordon specifically "chose to disinherit his daughter by adopting the 'statutory will' provided for in the Illinois Probate Act. This was his choice. . . ." This is akin to the argument in *In re Estate of Karas* and *Labine v. Vincent, supra*, that there is "no insurmountable barrier" to the decedent writing a will. In Appellants' Brief (pp. 43-46) several points were made demonstrating that this was not a rational basis for the invidious discrimination, and Appellee's brief does not address any of these arguments. First, the potential option of the decedent is irrelevant where the state is taking affirmative discriminatory action; this is established by *Reed v. Reed*, 404 U.S. 71 (1971), invalidating gender discrimination in intestate disposition procedures. Appellee's argument and *Labine* simply cannot be reconciled with the *Reed* decision on this point.[18] Second, it is not the options of the parents that are crucial; it is the children whose rights are being violated by state action, and the children have no options available to them. *Weber v. Aetna Casualty & Surety Co., supra; Jimenez v. Weinberger, supra; Eskra v. Morton*, 524 F.2d 9, 15 (7th Cir. 1975). Their fate is determined by the interactions of the state and the father. Such a scheme is not neutral; it merely uses the state action to multiply the ways in which the illegitimate child can pay for the acts and omissions of the parents, suspending the child's rights perilously at

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[18] While the decedent in *Reed* was a minor, this was not a factor in the Court's analysis or holding. The statute was found unconstitutional as applied to all decedents, whether or not they could have left a will.

the mercy of forces beyond his or her control. Third, the fiction that all decedents know the intestacy law and, by not writing a will, silently imply that their desires accord with the statutory disposition, is stretched past the breaking point in this case.[19] Sherman Gordon was a 28-year old man of marginal economic resources who was the victim of a homicide. Appellee's attempt to give personal significance in his case to the general fictional presumed intent is unwarranted. A minority of adult Americans leave wills, and the proportion is smaller among those in Gordon's age and economic group.[20] (Appellants' Brief, pp. 45-46.) The failure to write a will is based on age, economic status, and a generalized faith (misplaced in this instance) that the state will do justice, rather than on specific knowledge of and agreement with the statutory disposition. Factors mentioned for intestacy include: procrastination; illusions of continued life, especially among young

[19] Three cases are cited at Appellee's Brief, p. 18, for the proposition that Gordon's failure to execute a will means he personally intended to leave his property according to the intestacy scheme: *Hedlund v. Miner*, 395 Ill. 217, 69 N.E.2d 862 (1946); *Belfield v. Findlay*, 389 Ill. 526, 60 N.E.2d 403 (1945); *Ickes v. Ickes*, 386 Ill. 19, 53 N.E.2d 584 (1944). In fact, all three cases are inapposite; each involved questions of interpretation of wills and presumptions that the testators knew other, unrelated, aspects of law.

[20] Testamentary disposition is increasingly de-emphasized because of the vast increase in property passing by "will substitutes," including, for the poor and moderate income groups, life insurance, employee benefit plans, and public social insurance schemes. See Langbein, *Substantial Compliance With the Wills Act*, 88 Harv.L.Rev. 489 (1975); Carroll, *The Interplay of Probate Assets and Nonprobate Assets in the Administration of a Decedent's Estate*, 25 DePaul L.Rev. 363 (1976). For those of little means, there is thus increasingly limited incentive to go through the expense of having a will written to dispose of residual property. Moreover, there may be an assumption that the state intestacy disposition accords not only with blood ties, and not only with support obligations (which will frequently pass more property than will be passed at death), but also with such insurance schemes as Social Security, thereby including illegitimate children.

adults with small estates; beliefs that legal fees for writing a will are high or that intestacy will avoid probate court and delays in distribution. Bowe & Parker, *Page on Wills*, 24-26 (1960). Knowledge of and agreement with the statutory disposition are not mentioned as a factor. Moreover, the statute here is consistently applied whether or not the father has testamentary capacity, and the state uses devices such as unfavorable tax rates (see Section II-A, *supra*) to coerce any fathers actually knowledgeable of the law to conform their actions to the mold of the intestacy statute.

Thus, to the degree that the presumed intent/no insurmountable barrier arguments attempt to place the state in the role of a passive bystander, allowing a populace of knowledgeable decedents to freely devise their property or to choose the statutory disposition, the argument pyramids unjustified fictions on top of unwarranted myths. This is particularly invidious because the fictions and myths are structured (a) to the disadvantage of a class of people against whom there has been pervasive discrimination and (b) so that the disadvantaged group itself has no control or influence over the relationship between the state-imposed fictions and the father who is theoretically capable of altering the fictions.

In *Taylor v. Louisiana*, 419 U.S. 522 (1975), this Court reversed a criminal conviction based on the unconstitutionality of a Louisiana statute which provided that a woman would not be selected for jury service unless she filed a written declaration of her desire to serve. The invalid statute was, therefore, structurally identical to the scheme here. The statute was based on state action incorporating archaic notions of the desire or intent of a gender-based group (419 U.S. at 533-537); there was concededly some adminis-

trative burden avoided by the statute (419 U.S. at 535); and, finally, there was no insurmountable barrier to women serving on the jury, since a simple written declaration would lead to inclusion, but the appellant had no control over whether or not women exercised this option. This structure was held invalid; on the last point it was noted that the selection system, while not disqualifying women *per se*, "in operation [has] conceded systematic impact . . ." and "operates to exclude . . ." 419 U.S. at 525.

In this case the resulting impact on the children is also analogous to that in *Brown v. Bd. of Education*, 347 U.S. 483, 494 (1954), another case defended on the basis of purported state neutrality:

> "To separate [these children] from others of similar age and qualifications . . . generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . The impact is greater when it has the sanction of law. . . ."

Here also the scheme is not neutral; it has the sanction of law and of a history of complementary laws–some only recently invalidated by the courts–which individually and in concert put the power and "moral authority" of the state between the father and his child, and which sanction and encourage the termination of their relations.

Finally, the invalidity of the "no insurmountable barrier" argument is apparent when it is realized that it could be used to shield any intestacy statute, no matter how irrational. Preferences for all male children of the decedent over all female children, or to all male relatives over all female relatives, are just as supportable under the argument as the present statute, but clearly could not survive the scrutiny applied in *Reed v. Reed, supra.* A variety of other egregious possibilities, also

perpetuating archaic stereotypes, or arising from pure arbitrary action, exist: a statute providing for the escheat of the intestate property of blacks or women or illegitimates; an inclusion of illegitimate children and exclusion of legitimate children. In each instance there would be "no insurmountable barrier" to the decedent altering the irrational state action. But the statutes could not be sustained merely because of the general escape valve or a defense that the individual decedent must have agreed with the statutory disposition or else he or she would have left a will. Rather, it is necessary to look at the state intestacy statute by its own terms, and its justifications, if any. The potential ability of the decedent to have written a will (even leaving aside the multiple restrictions, see Section II-A, *supra*) cannot be conceptualized as a rationale underlying the state's own choices. The descriptive fiction is not itself a state purpose which will serve as a shield against scrutiny of invidious and irrational discrimination.

In short, the intestacy statute is the underlying provision, and it invidiously discriminates against illegitimate children. The fact that in some circumstances there is "no insurmountable barrier" to the father partially undoing this invidious discrimination is irrelevant. As stated in analogous circumstances in *Stanley v. Illinois*, 405 U.S. 645, 647 (1972), "This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone."

C. The discrimination against illegitimate children is not rationally related to any State interest in preventing spurious claims or the prompt or definitive devolution of intestate property.

The only other state interest alleged by Appellee to be furthered by the challenged classifications is that of preventing spurious claims and promoting the prompt and definitive devolution of property and the stability of land titles. (Appellee's Brief, pp. 15, 18-21) This Court has repeatedly emphasized that such concerns, while valid, may not constitutionally be used to justify the creation of a broad exclusionary "barrier that works to shield otherwise invidious discrimination." *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (See Appellants' Brief, pp. 39-43) Once paternity is established pursuant to rational methods consistent with favoring entitlement, all children, legitimate or not, must be treated equally. The problems of proof connected with paternity do not justify a "blanket and conclusive exclusion. . . ." *Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974).

These principles were recently reaffirmed in *Mathews v. Lucas, supra*. While the crucial Congressional purpose behind the statute at issue was "administrative convenience," 96 S.Ct. at 2764, the Court only upheld the statute because it was "carefully tuned" to such considerations. 96 S.Ct. at 2766. This was contrasted with situations, such as that present here, which, under the guise of confronting proof problems, do nothing more than "broadly discriminate between legitimates and illegitimates without more." *Lucas*, 96 S.Ct. at 2766.

Illinois has imposed a sweeping, indeed universal, rule that bars even children whose paternity has previously been adjudicated by its own courts and/or voluntarily

acknowledged. Such a scheme is simply "either counterproductive or irrationally overinclusive even with regard to this significant, nonillusory goal," and is accordingly "invalid under rational-basis standards of equal protection review." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, at 653 (1974) (Mr. Justice Powell concurring). If some sub-groups of illegitimate children present disproportionate proof problems, then the legislative remedies must "meet the cases presenting those problems without arbitrarily exterminating those which do not." *Miller v. Laird*, 349 F.Supp. 1034, 1046 (D. D.C. 1972) (three-judge court).

Both Appellee and the Illinois Supreme Court have constructed their proof arguments not around the realities of this case or analogous situations, but around proof problems in abstract cases, hypothesizing extreme situations involving collateral or distant relatives (Appellee's Brief, pp. 19-20; *Karas*, at A 48-49). This approach merely begs the question. The illegitimacy decisions rendered by this Court have made clear that there must be a reasonably careful scrutiny of the nexus between the actual proof problems and the scope and quality of the statutory exclusion. A statute which makes no attempt to approximate equivalence, but simply bars all illegitimate children, will not meet this test. Moreover, *Reed v. Reed*, 404 U.S. 71 (1971), establishes that such principles apply in the probate area as well.

The utter irrationality of the method by which Section 12 of the Probate Act purports to "prevent spurious claims" is highlighted here, where the statute excludes Deta Mona Trimble in spite of the fact that paternity was determined by court decree, prior to the death of the decedent. Whatever the general validity of the state interest in preventing spurious claims, that

interest does not justify a classification which precludes inheritance even by those who are able to submit conclusive proof of paternity.[21]

III.

THE DISCRIMINATION AMONG ILLEGITIMATE CHILDREN ON THE BASIS OF THE SEX OF THE SURVIVING PARENT HAS NO RATIONAL BASIS.

In addition to invidiously discriminating against illegitimate children, the statute discriminates without rational basis *among* illegitimate children, based on the sex of the surviving parent. (Appellants' Brief, pp.

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[21] Congress has created a national mechanism for ascertainment of paternity. Pub.L.93-647. The accompanying Senate Finance Committee report states establishing paternity may occasionally conflict with the mother's interests, but that the "child's right to support, *inheritance*, and to know who his father is deserves the higher social priority." Senate Report No. 93-1356, 1974 U.S. Code Cong. and Admin. News 8133, 8155. (Emphasis added.) The Act, *inter alia*, requires public assistance recipient mothers to cooperate in establishing the paternity of children and requires States to make paternity determination services available to all individuals, regardless of financial status. 42 U.S.C. §§602(a) (26) (B), 654 (6) (A). There is federal reimbursement of 75% of law enforcement, judicial, and other costs of this process. 42 U.S.C. §655(a), 1974 U.S. Code Cong. and Admin. News at 8153. There was a recognition that, in the ascertainment of paternity, the reliability of blood and related tests is extremely high, contrary to many popular misconceptions. Senate Report 93-1356, 1974 U.S. Code Cong. and Admin. News, at 8155-8156. See also Krause, *Illegitimacy, Law and Social Policy*, at pp. 123-128, 138. Paternity adjudication is thus considered by Congress sufficiently reliable to trigger, for child support purposes: garnishment of federal employees' salaries and waiver of certain federal privacy standards in order to locate fathers. 42 U.S.C. §§653(b), 659. Social Services Amendments of 1974, 88 Stat. 2351, §§101(a), 101(b)(1), 42 U.S.C. §§602(a)(26)(B), 651 *et seq*.

50-55) Children inherit if the mother dies; but illegitimate children–like Deta Mona Trimble–do not inherit from a decedent father. The statute, identically to that in *Weinberger v. Weisenfeld*, 420 U.S. 636, 651 (1975), therefore irrationally "discriminates among surviving children solely on the basis of the sex of the surviving parent." As a result of this discrimination, children like Deta Mona Trimble suffer a direct pecuniary loss.

Appellee misapprehends the argument made in this case by stating that the statute makes "no distinction based on the sex of the child" and attributing to Appellants an "argument that the child has been discriminated against on the basis of her sex . . ." (Appellee's Brief, pp. 27-28). Neither Appellee nor the Illinois Supreme Court in *Karas* has suggested that this discrimination among illegitimate children has any justification. The demonstration is Section II, *supra*, that there is no rational basis for the statute is equally applicable here; but the discrimination is even more pernicious because the statute is being erratically and differentially applied.

The discrimination is thus not only similar to that struck down in *Weisenfeld, supra*, but is also analogous to the differentiation of subclasses of illegitimate children invalidated in *Jimenez v. Weinberger*, 417 U.S. 628 (1974). And see *Green v. Woodard*, 40 Ohio App.2d 101, 318 N.E.2d 397 (Ohio Ct. App. 1974), invalidating a state intestacy statute excluding illegitimate children from inheriting from their fathers precisely because the distinction among illegitimate children based on the sex of the surviving parent had no rational basis.

IV.

LABINE V. VINCENT IS DISTINGUISHABLE FROM THE PRESENT CASE; IN ADDITION, *LABINE* SHOULD BE OVERRULED.

Both the Appellee and the court below rely heavily on this Court's decision in *Labine v. Vincent*, 401 U.S. 532 (1971), to support the validity of the challenged classifications. In so doing, they gloss over significant differences with the unique statute challenged in *Labine*. Moreover, they ignore repeated signals from this Court that the reasoning, if not the holding, of *Labine* has been repudiated.

A. *Labine v. Vincent* is distinguishable from the instant case in several significant aspects.

There are several distinctions between the statute at issue in *Labine* and the Illinois statute present here (see Appellants' Brief, pp. 29-30, 50-52). First, unlike Illinois law, the *Labine* statute "does not broadly discriminate between legitimates and illegimates without more." *Mathews v. Lucas*, 96 S.Ct. at 2766. While not as "carefully tuned" as the *Lucas* scheme, the Louisiana intestacy statute was inclusive of illegitimate children in three significant ways.[22] In Louisiana "natural"

[22] The cases Appellee cites (Brief, pp. 24-26) as following *Labine* also present statutory schemes which are substantially inclusive of illegitimate children. *Watts v. Veneman*, 476 F.2d 529 (D.C. Cir. 1973), involved the identical issue as that presented in *Mathews v. Lucas, supra*, and was similarly resolved against the claimants only because of the broadly inclusive nature of the statute. See Section I, *supra*. *In re Estate of Hendrix*, 326 N.Y.S.2d 646 (1971), involved a child whose paternity was neither adjudicated nor acknowledged. The Surrogates Court noted that the statute was substantially inclusive because it granted intestacy rights to children whose paternity had been adjudicated before the father's death.

children at least had preference over escheat to the state. More important, in Louisiana illegitimate children had a right to support from the estate, thereby giving them effective inheritance rights which would in some circumstances equal or exceed a distributive share. In addition, in *Labine*, the child could inherit in intestacy on terms equal to legitimate children if the father's acknowledgment stated a desire to legitimate the child. 401 U.S. at 539. These three factors presented a scheme of significant coverage of the child which has no parallel in the Illinois system of total exclusion. The *Labine* Court, moreover, emphasized that the holding related to the "circumstances presented in this case," 401 U.S. at 539, after it had earlier described the many complex and unique features of the Louisiana scheme, including the three methods of including illegitimate children mentioned above. There is a sharp contrast with Illinois, where the state *does* "broadly discriminate between legitimates and illegitimates without more." *Mathews v. Lucas, supra.*

Second, the classifications challenged here discriminate on the basis of both illegitimacy and sex, introducing an additional arbitrariness lacking in the Louisiana scheme. The *Labine* statute treated all illegitimate children alike. The Illinois statute discriminates among such children based on parental gender, since the illegitimate child can inherit from the mother but not the father. (See Section III, *supra.*) This case thus bears a closer resemblance to *Weinberger v. Weisenfeld*, 420 U.S. 636 (1974), and *Jimenez v. Weinberger*, 417 U.S. 628 (1974), than to *Labine.*

Thus, the Illinois pattern of discrimination and complete exclusion on the basis of illegitimacy and sex of the surviving parent can hardly be justified by reliance on the constitutionality of the Louisiana

scheme, which was internally consistent, and was not purely exclusionary, but rather provided substantial rights for all illegitimate children.

B. *Labine v. Vincent* should be overruled.

Even if *Labine* were not fundamentally distinguishable, it should be overruled. As has been shown, its result and rationale are basically irreconcilable with the reasoning of subsequent decisions of this Court. *Stare decisis* operates neither as an immutable command divorced from deliberate inquiry nor as "a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Its function is particularly limited in Constitutional cases; since the Constitution represents the ultimate authority, prior judicial decisions cannot be the sole determinant of constitutionality.

> Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purported vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it. *Graves v. New York*, 306 U.S. 466, 491 (1939) (Justice Frankfurter, concurring).

As recently noted in *Edelman v. Jordan*, 415 U.S. 651, 671 (1974):

> Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law.[14]

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[14] In the words of Mr. Justice Brandeis: ". . . [I]n cases involving the Federal Constitution, where correction through legislative action is practically

> impossible, this court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning . . ." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (dissenting opinion).

See also *St. Joseph Stockyards Co. v. U.S.*, 298 U.S. 38, 94 (1936) (Justices Stone and Cardozo concurring).

In the same opinion cited favorably in *Edelman v. Jordan, supra*, Mr. Justice Brandeis went on to particularly limit the function of *stare decisis* in cases, such as the present one, involving equal protection issues,

> . . . where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 410 (1932) (dissenting opinion).

See also *Smith v. Allwright*, 321 U.S. 649, 665 (1944). Moreover, this Court has generally regarded application of *stare decisis* as inappropriate when a prior decision stands as a "significant departure" from an otherwise consistent line of decisions. *Boys Market v. Retail Clerks Union*, 398 U.S. 235, 241 (1970).[23] From the very first, *Labine* has been considered an insupportable anomaly, criticized on its own terms and in comparison to *Levy v. Louisiana, supra*:

> An extraordinarily fine line was drawn in *Labine v. Vincent*. . . . It is true that there is a distinction

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[23] See also *Afroyim v. Rusk*, 387 U.S. 253, 255, 256 (1967), reversing a case which "has been a source of controversy and confusion ever since," and where later cases and commentators "have cast great doubt upon the soundness" of the earlier holding. *Afroyim*, overruling in 1967 *Perez v. Brownell*, 356 U.S. 44 (1958), is one of many instances in which this Court has overruled a relatively recent case. See, e.g., *National League of Cities v. Usery*, 96 S.Ct. 2465 (1976), overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968); *Stone v. Powell*, 96 S.Ct. 3037, 3045 n.16 (1976), overruling rationale of *Kaufman v. United States*, 394 U.S. 217 (1969); *Smith v. Allwright*, 321 U.S. 649 (1944), overruling *Grovey v. Townsend*, 295 U.S. 45 (1935).

> between the two cases [*Levy* and *Labine*]; it is not so clear that the distinction warrants a difference in results.

Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 S.Ct. Rev. 265, 312.[24]

Labine was thus not part of a long-standing doctrine or a series of similar cases.[25] In addition, this Court has subsequently isolated *Labine* and undermined the decision's authority in a series of later cases challenging discrimination against illegitimate children. In light of these subsequent decisions, *Labine* has become increasingly indefensible, has caused confusion in the lower courts, and has become subject to renewed and vigorous

[24] See also: Krause, *Illegitimacy, Law and Social Policy*, at vii-ix (1971); Pascal, *Louisiana Succession and Related Law and the Illegitimate: Thoughts Prompted by Labine v. Vincent*, 46 Tul. L.Rev. 167 (1971); Petrillo, *Labine v. Vincent, Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 Dick.L.Rev. 377 (1971); Note, *Labine v. Vincent: Louisiana Denies Intestate Succession Right to Illegitimates*, 38 Brooklyn L.Rev. 428 (1971); Comment, *Constitutional Law–Equal Protection of the Laws–Inheritance by Illegitimates*, 22 Case W. Res. L.Rev. 793 (1971); Comment, *Constitutional Law–Equal Protection–Denial of Illegitimate Child's Right of Inheritance from Father Who Had Acknowledged But Not Legitimatized Heir Does Not Constitute a Violation of Child's Equal Protection Rights Under the Fourteenth Amendment*, 47 N.D. Law. 392 (1971); Comment, *Why Bastards, Wherefore Bastards*? 25 S.W. L.J. 659 (1971); Comment, *Constitutional Law–Illegitimacy–The Emasculation of Equal Protection for "Bastards,"* 3 Rut.-Cam. L.J. 316 (1971).

[25] The inconsistency of *Labine* with other illegitimacy decisions is particularly troublesome because *Labine* itself is not supported by prior case law. The entire majority opinion cited only two cases as providing support on any point. 401 U.S. at 539 n.16. The first, *Mager v. Grima*, 8 How. 490, 12 L.Ed. 1168 (1850) predated the Fourteenth Amendment and simply upheld an inheritance tax imposed on property passing to aliens. The other, *Lyeth v. Hoey*, 305 U.S. 188 (1938), concerned federal tax treatment of compromised probate claims; the Court stated as a pure factual proposition that state action establishes rights to make testamentary disposition and probate procedures, and held that the federal tax treatment of inheritances is governed by construction of the federal statute.

attack by courts and commentators.[26] Similarly, the Illinois Supreme Court decision in *In re Estate of Karas*, along with *Labine*, has already itself been criticized. Turkington, *Equal Protection of the Laws in Illinois*, 25 DePaul L. Rev. 385, at 404-409 (1976).

One of the strongest statements of the confusion and inconsistency resulting from the *Labine* anomaly is the recent Kentucky Court of Appeals decision in *Pendleton v. Pendleton*, 531 S.W.2d 507, 510-511 (1975), *appeal docketed*, 44 U.S.L.W. 3711 (May 4, 1976) (No. 75-1610), contrasting *Labine* with *Weber, supra*, and *Gomez, supra*:

> [I]t appears that here is a corner of the world Alice in Wonderland would not find unfamiliar.
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> * * *
>
> [I]t would be our inclination to hold that although a right of inheritance may not have the immediacy or social significance of a present need for support, yet a right is a right, the existence of which surely ought not to depend on whether it falls within the ambit of state-enforced welfare legislation. If a state cannot constitutionally force a father to support his children without including illegitimate children, we can find no justification in logic for its authority to deny illegitimate children the same right of inheritance conferred upon other children. Though the right has something of a fugitive nature in that the father may of course

[26] See Krause, *The Uniform Parentage Act*, 8 Fam.L.Qtrly. 1 (1974); Wallach & Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act*, 23 Kan.L.Rev. 23 (1974); Note, *Decedents' Estates–Descent and Distribution Statutes*, 8 Ind. L.Rev. 732 (1975); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U. L. Rev. 479 (1974); Note, *Illegitimate Children and Constitutional Review*, 1 Pepp. L.Rev. 266 (1974); Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause*, 26 Stan.L.Rev. 155 (1973); Comment, *Illegitimate Intestate Succession Rights in Kentucky*, 3 N.Ky.L.Rev. 196 (1976). See also cases cited in Appellants' Brief at p. 13 n.2.

> discriminate against any child, legitimate or illegitimate, it seems incongruous that the state should be allowed to do it for him. But after all, this is mere logic. . . .

In summary, the reasoning of *Labine* has already been undermined and all that remains is the formalistic shell. *Labine* can properly be distinguished from this case and/or narrowed to the unusual Louisiana circumstances. But *Labine* can also be overruled with no negative and many beneficial consequences. Given the conflict between *Labine*'s approach and rationale on the one hand and a multiplicity of decisions on the other, and in light of the unrelenting criticism, overruling *Labine* would be perceived as harmonizing the law rather than breaking with principles of *stare decisis.*

V.

THE PROBATE ACT EXCLUSION OF ILLEGITIMATE CHILDREN FROM INHERITANCE FROM THEIR FATHERS INVIDIOUSLY DISCRIMINATES AGAINST WOMEN WITHOUT RATIONAL BASIS, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. The discrimination against women has no rational basis.

The statute at issue discriminates against women since they are differentially burdened in carrying out obligations to their illegitimate children by the fact that the child cannot inherit from the father. (Appellants' Brief, pp. 56-61) Appellee concedes that the statute "tends to discriminate against women" (Appellee's Brief, p. 31). To justify the discrimination appellee

offers only one suggestion: since it is more difficult to prove paternity than maternity, the invidious discrimination is permissible.[27] This is merely a restatement of the argument concerning spurious claims and avoiding occasional contests, a position consistently rejected by this Court (Section II-C, *supra*). Moreover, the argument that sex discrimination in an intestacy statute can be justified to avoid occasional probate contests has been specifically rejected. *Reed v. Reed*, 404 U.S. 71 (1971).

The only proof "problems" in regard to children whose paternity has been definitively established are illusory. The statute thus ultimately rests on a perpetuation of historic discrimination against women in general, and in particular against mothers of illegitimate children, based in turn on archaic sexual stereotypes and uneven apportionment of blame. Appellants' Brief, pp. 60-61. *Cf. Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Stanley v. Illinois*, 405 U.S. 645 (1972).

B. The issue of sex discrimination is properly presented for review.

Appellee argues that no party has standing to raise the sex discrimination issue and that the issue of discrimination against Jessie Trimble was waived by failure to raise it in the Circuit Court of Cook County. This argument is without merit.

First, the injury suffered by Jessie Trimble stems directly from and is intertwined with the injury suffered by her minor daughter. Deta Mona Trimble

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[27] The primary case relied on here by the appellee, *In re Estate of Pakarinen*, 287 Minn. 330, 178 N.W.2d 714 (1970), *appeal dismissed*, 402 U.S. 903 (1971), examined a statute substantially more inclusive of illegitimate children than that at issue here. In *Pakarinen*, acknowledged illegitimate children could inherit. Thus, unlike Illinois, Minnesota did *not* exclude all illegitimate children based on hypothetical proof problems for some children.

therefore clearly has standing to challenge the discriminatory impact of the sex-based classifications not only upon herself (see Section III, *supra*) but also upon her mother. *Stanton v. Stanton*, 421 U.S. 7 (1975); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Jablon v. Secretary of HEW*, 399 F.Supp. 118, 124 (D. Md. 1975) (Three-judge court). *Cf. Weinberger v. Weisenfeld*, 420 U.S. 636 (1975).

Second, because her injury is inextricably intertwined with that of her daughter, Jessie Trimble can raise the issue of the injury to herself by means of her representative status challenging the injury to Deta. This Court has held, in a suit to vindicate support rights for the child, that objections to the technical designation of the mother's status in the litigation are unrelated to the reality of her injury and standing:

> We are satisfied that it makes no difference whether the appellant's interest in [the economic rights of her minor daughter] is regarded as personal to appellant or as that of a fiduciary.
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> * * *
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> Her interest in the controversy therefore, is distinct and significant and is one that assures "concrete adverseness" and proper standing on her part. *Stanton v. Stanton*, 421 U.S. 7, 11, 12 (1975).

Third, appellee relies on cases (Appellee's Brief, p. 33) which involved attempts to raise before this Court issues raised neither in the court from which the appeal was taken nor in the *certiorari* petition or jurisdictional statement to this Court. In the instant case, the issue was raised and briefed and decided in the Illinois Supreme Court (A. 47, 49-52), and was specifically set

out in the Jurisdictional Statement. The Illinois Supreme Court's consideration of the issue is, moreover, consistent with general Illinois practice, since pure issues of law, particularly those affecting the public interest, may appropriately be considered on appeal, even if the trial court has not considered such issues. *People ex rel. Baylor v. Bell Mutual Casualty Co.*, 54 Ill.2d 433, 298 N.E.2d 167 (1973); *Quitman v. Chicago Transit Authority*, 348 Ill. App. 481, 109 N.E.2d 373 (1st Dist, 1952).

Finally, under Illinois law, Jessie Trimble, as one immediately affected by the judgment of the trial court, could appeal, even if she were not a party. *Nott v. Wolf*, 18 Ill.2d 362, 163 N.E.2d 809 (1960); *People ex rel. Yohnka v. Kennedy*, 367 Iil. 236, 10 N.E.2d 806 (1937). The Motion for Direct Appeal to the Illinois Supreme Court named her separately as an appellant (A 31) and Illinois Supreme Court's acceptance of this (A 36, 55) was appropriate under Illinois law. Ill. Rev. Stat. ch. 110A, §§303(c)(4), 366(a)(2). See also *Air Line Stewards and Stewardesses Ass'n v. Quinn*, 35 Ill.2d 106, 219 N.E.2d 499 (1966); *People v. N.Y. Central R.R. Co.*, 391 Ill. 377, 63 N.E.2d 405 (1945); *National Bank of Republic v. Kaspar State Bank*, 369 Ill. 34, 15 N.E.2d 721 (1938). In addition, since none of the objections raised by appellee is of a jurisdictional nature, appellee waived such objections by failing to raise them in the Illinois Supreme Court. Ill. Rev. Stat. ch. 110A, §341(e)(7), (f); *Flynn v. Vancil*, 41 Ill.2d 236, 242 N.E.2d 237 (1968); *People ex rel. Nelson v. Olympic Hotel Bldg. Corporation*, 405 Ill. 440, 91 N.E.2d 597 (1950).

The issue of the sex discrimination against Jessie Trimble is therefore properly before this Court.

CONCLUSION

For the reasons stated, appellants respectfully request that this Court reverse the judgment of the Illinois Supreme Court, and find that: (1) The Illinois Probate Act invidiously discriminates against and among illegitimate children, thereby denying to Deta Mona Trimble the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment, and (2) The Illinois Probate Act invidiously discriminates against Deta Mona Trimble and Jessie Trimble on the basis of Jessie Trimble's sex, in violation of the Fourteenth Amendment.

Respectfully submitted,

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*Appellants' attorneys wish to express their appreciation to Joseph Bomba, Rita Diehl, and Eileen Sweeney for their assistance in the preparation of the Appellants' briefs.